STATE OF ILLINOIS
BEFORE THE ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission,	)	
	)	
on its own motion,	)	
	)	ICC Docket No. 01-0609
v.	)	
Illinois Bell Telephone Company	)	
	)	
Investigation of the propriety of the rates, terms,	)	
and conditions related to the provision of the	)	
Basic COPTS Port and the COPTS-Coin Line Port.	)	

INTERVENORS' EXCEPTIONS TO THE
ALJ'S PROPOSED ORDER

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INTERVENORS' EXCEPTIONS TO
THE ALJ'S PROPOSED ORDER

TruComm Corporation and Data Net Systems, LLC ("CLEC Intervenor's")[1], by the attorney's and pursuant to the Rules of Practice of the Illinois Commerce Commission ("ICC") and the Administrative Law Judge's Order, respectfully files these Exceptions to the ALJ's Proposed Order.

This case is about whether SBC is required to provide to CLECs all features and functions associated with the switching network elements required under Section 13-801 of the Illinois Public Utilities Act, 220 ILCS 5/13-801, and Section 251 of the federal Communications Act, 47 U.S.C. § 251. If so, the issue is then whether SBC may assess a rate to a CLEC for features and functions associated with the network element that are not used by the CLEC, and then add additional costs for the features and functions of the network element that are used.

The Proposed Order establishes a rate for unbundled switching ports that does not comply with the Total Element Long Run Incremental Cost (TELRIC) principles required under Section 251 and Section 3-801 of the Illinois Public Utilities Act. If adopted, the Proposed Order

1 Payphone Services, Inc. is no longer participating in this proceeding.

would be preempted under both the federal Communications Act's requirement that rates for network elements be based on TELRIC, as well as the requirement under Section 13-801 of the Illinois Public Utilities Act that the rate for the basic line ports be based on the forward looking economic cost of the element.

Exception 1. The Proposed Order fails to recognize that SBC's current rate of $2.18 for a line port was set by the Commission to allow SBC to recover its costs of providing "all features and functions" associated with the Line Port network element.

As recently as August 21, 2003, the FCC held incumbent LECs have a duty to provide "nondiscriminatory access to network elements on an unbundled basis . . . on rates, terms and conditions that are . . . nondiscriminatory."[2] The FCC emphasized that the term "network element" specifically includes all "features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provisions of a telecommunications service." *Triennial Review Order*, ¶ 9, *quoting* 47 U.S.C. § 153(29.)

The Proposed Order acknowledges that line port at issue in this proceeding is "the same basic line port that SBC makes available to CLECs to use in providing telecommunications services to end users, and is the same basic line port that SBC uses to provide telephone service to its own retail customers." Proposed Order, p. 3. Moreover, the Proposed Order acknowledges that:

> Flex ANI is a software feature embedded in all switches that, when enabled, allows a local exchange carrier ("LEC") to insert an additional set of pre-defined digits into the

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[2] *In the matter of the Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Dkt. No. 01-0338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (*"Triennial Review Order"*) FCC 03-36 (Rel. Aug 21, 2003), ¶ 9, *Quoting* 47 U.S.C. § 251(c)(3).

> automatic number identification ("ANI") stream accompanying each call, thereby instructing the network of unique routing or rating instructions associated with the call. (Starkey, CLEC Ex. 1.0 at 4.) FLEX-ANI is not specifically used for pay telephone services, but instead, can be used for any number of current, or future, network services that require special rating or routing instructions. (*Id.*)

Id.

Given these findings, the Proposed Order then correctly concludes that the Commission set a rate of $2.18 that "would fully recover SBC's cost of providing UNE-P services with AIN-based shared transport." Proposed Order, p. 3. What the Proposed Order forgets to conclude, is that the rate of $2.18 set by the Commission in ICC Docket No. 00-0700[3] not only recovered the capital cost of the line port, it also recovered SBC's costs of providing vertical features associated with the line ports. More specifically, the TELRIC rate included a cost component for the licensing fees paid by SBC to switch vendors that are associated with the switch features. Tr. 62.

Data Net Systems and TruComm request that the Proposed Order reflect this as one of the key and fundamental Undisputed Facts, p. 3. Therefore, Section II, page 3 of the Proposed Order should be amended as follows:

Proposed Exception Language:

> Finally, in ICC Docket No. 00-0700,(Final Order entered June 10, 2000) the Commission investigated the actual costs incurred by SBC in making UNE-P services available to CLECs with AIN-based shared transport. The Commission held that a rate of $2.18 would fully recover SBC's cost of providing UNE-P services, with AIN-based shared transport. <u>This rate also recovers SBC's costs of the software licenses paid to the switch vendors for the vertical features associated with the port. SBC's costs studies supporting the rate of $2.18 assumed an average set of vertical features that were made available to all CLECs that purchase the Basic Line Port, including such features as Call waiting, Caller ID, and Multi-ring service. Tr. 62. PC Cross Ex. 5. All CLECs that purchase a basic line port were ordered by the Commission pay the same price ($2.18) regardless of whether the CLEC uses the switch features. Tr. 68-69. The Payphone Coalition CLECs do not need the features of the switch that are used to provide Call waiting, three way</u>

[3] *In re the Commission's Investigation into Tariff Providing Unbundled Local Switching with Shared Transport*, ICC Dkt. No. 00-0700, Order, July 10, 2002 (hereinafter "00-0700 Order.")

calling, caller ID, or other features made available by Ameritech on a UNE-P port, although the rate of $2.18 per month includes the costs associated with these vertical features. (Starkey Direct, Ex. 1.0, p. 17; PC Cross Ex. 5.)

Exception 2: Regardless of the Commission's Initiating Order, the Commission is preempted from setting a rate for a network element that does not comply with TELRIC, and the Line Port rate of $3.24 is not based on SBC's TELRIC of offering that line port.

The Proposed Order concludes its investigation in this proceeding, and the setting for SBC's rates, is limited by the language of the Commission's initiating order in this proceeding. Proposed Order, p. 29. This is simply wrong as a matter of law; regardless of the language of the initiating order, the Commission must consider whether the rates for network elements provided by SBC comply with TELRIC principles. The Proposed Order incorrectly concludes that the Commission's analysis in this proceeding is limited to whether Ameritech Illinois has either already recovered the costs for Flex ANI implementation, and whether there is cost justification for an additional $1.06 [then $2.19] recurring monthly rate element. Proposed Order, Section IV, p. 29. Notably, the Proposed Order does not conclude that the additive rate element of $1.06 for the software features is compliant with TELRIC principles. In fact, the Proposed Order adopts the rate element recognizing that the Flex ANI vertical features, like the other vertical features such as caller ID, are being provided "to all requesting carriers by SBC." Proposed Order, p. 30. However, the rate was set by SBC assuming that only Data Net and TruComm would pay for the software features. This rate design is not based on cost, and is not in compliance with TELRIC pricing requirements.

Even assuming that the Commission concludes that there is a cost incurred by SBC to make Flex ANI available, and that SBC has not specifically recovered the licensing fees associated with these vertical features in the Commission-approved rate of $2.18 from ICC

Docket No. 00-0700, the Commission is still precluded from setting a rate of $3.25[4] for the Basic Line Port with Flex ANI unless that rate is set based on SBC's Total Element Long Run Incremental Cost (TELRIC.) Regardless of the language of the Commission's initiating order, the Commission cannot approve of a rate for a network element that does not comply with TELRIC. 47 U.S.C. § 252(d)(1)(A(i); 47 C.F.R. § 51.505; 220 ILCS 5/13-801. SBC acknowledges that the rate for the basic line port with Flex ANI is not based on the TELRIC of that network element. Tr. 23. Instead, SBC the rate is based on a combination of a TELRIC rate for the basic line port, plus an allocated cost study for the licensing fees.

Under TELRIC principles the cost of a network element must be "measured based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration. . . .. 47 C.F.R.§ 51.505(b)(1). The TELRIC of an element is "the forward-looking cost over the long run of the total quantity of the facilities and functions that are directly attributable to, or reasonably identifiable as incremental to, such element, calculated taking as a given the incumbent LEC's provision of other elements." 47 C.F.R. §51.505(b). The costs of providing the vertical features associated with the switching is included in the Basic Line Port costs studies. Tr. 62. For this rate, CLECs have a right to access all features and functionalities of the switch. *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, FCC 96-394 (rel. Sept. 27, 1996), ¶ 260 ("*First Report and Order*.") A state commission decision that adopts a different methodology, such as the one here, where the cost of a single vertical feature is imposed on 1 or 2 carriers who are the first to order the feature, is preempted and is an unlawful rate. *Verizon Communications, Inc. v. FCC ("Verizon")*, 535 U.S. 467, 475, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002.)

[4] $2.18 for the Basic Line Port with all vertical features, plus $1.06 for the Flex ANI licensing fees.

The cost studies submitted by SBC show clearly that the rate element for a basic line port with Flex ANI vertical features is based on a mutated combination of TELRIC costs for the basic line port, plus an additional embedded cost study for the licensing fees associated with Flex ANI. The resulting rate of $3.24 per line per month for CLECs purchasing this network element does not comply with TELRIC pricing standards, and is an unlawful rate. This is particularly unlawful, because the additional cost of $1.06 per line per month is imposed only on CLECs that purchase the Basic Line Port to provide service to payphone providers, even though the Flex ANI software can be used for any number of current, or future, network services that require special rating or routing instructions. ((Starkey, CLEC Ex. 1.0 at 4.)

The rate for the basic line port of $2.18, on the other hand, is a rate that complies with TELRIC principles. According to SBC, this rate, approved by the Commission in ICC Docket No. 00-0700, includes not only the capital cost of the line port, but also the licensing fees for the average bundle of features associated with the basic line port. Tr. 62. In ICC Docket No. 00-0700, Ameritech's cost studies included a cost component for a "bundle of features purchased from Lucent" that included such features as call waiting, caller ID, and multi-ring service. *Id.*; PC Cross Ex. 5. All CLECs that purchase a basic switch port would pay the same price ($2.18) regardless of whether the CLEC uses the switch features. Ameritech's theory on why that is appropriate under TELRIC principles, is that "these features are made available to everyone, including payphones." Tr. 68-69. It violates the principles of TELRIC-based pricing for TruComm and Data Net to pay for the cost of the "average bundle" of switch features, even though they don't use these features, and then pay an additional rate for a single switch features they do use. Any Commission order that would so require, is preempted by Section 252.

Data Net Systems and TruComm request that the Proposed Order reflect this as one of the key and fundamental Undisputed Facts, p. 3. Therefore, Section II, page 3 of the Proposed Order should be amended as follows:

Proposed Exception Language:

In terms of the first issue, we find nothing in of the FCC Orders cited by the PC that remotely suggests that the issue of coin ports coupled with shared transport was considered by that body in ordering LECs to provide Flex ANI to payphone providers. In fact all of the orders are specific in addressing issues related to payphone provider compensation from IXCs and LEC cost recovery from payphone providers, not issues relating to cost recovery from CLECs, who in turn look to payphone providers. They are, thus, readily distinguishable and of no moment to the case *sub judice.* Further, none of the ICC dockets address this issue, which is a matter of first impression before this Commission. While it is true that some of the docket**s** have addressed the requirement that LECs provide all of the functions and functionalities of a switch when a switch is requested, that issue is not germane to this controversy, which is over pricing of one function that is inarguably being provided to all requesting carriers by SBC. The only issue is whether the costs that SBC is seeking to recover have been proven, and if so, whether the current rate for the basic line port already includes a cost recovery for vertical features associated with the basic line port. In our opinion ~~,they have~~ SBC has established that is has incurred costs associated with these licensing fees. In addition, consistent with our prior decision in ICC Docket No. 00-0700, the current rate of $2.18 includes a component for SBC to recover the costs associated with its licensing fees.

There is no dispute that SBC purchased the licenses for SFID 332 and 528, and no dispute over the amount spent for the licenses. The only dispute is over the uses of the software. The PC argues that based upon certain inferences from e-mail strings entered into the record as cross exhibits, one can conclude that SFID 332 and 528 were suggested as cures for long distance Flex ANI problems SBC was experiencing prior to its introduction of the coin port/shared transport UNE. SBC responds that the e-mails are equivocal and that there is no evidence tending to show that the software patches were ever used for any purpose other than resolving the coin call/Flex ANI problem. We agree with SBC. The e-mails are in fact equivocal. The fact that is not equivocal is that SBC did not purchase the rights to the patches until the coin line problem arose. The inference to be reached from this is that they were not utilized to correct another problem, but only to correct the stripping of the ANI digits from payphone calls. ~~Accordingly, the CLECs that intended to market the service to payphone providers and ultimately, the payphone providers themselves are the cost causers and should be the source of cost recovery.~~

However, while is can be concluded that SBC may have incurred the cost associated with Flex ANI, the cost of this vertical feature is already included in the $2.18 rate for the Basic Line Port. Notably, SBC recovers the costs associated with the average bundle of vertical features when it charges Data Net and TruComm for the Basic Line

Port. While these licensing fees for these particular vertical features may or may not have been included in the cost studies submitted by SBC in ICC Docket No. 00-0700, that fact is irrelevant to TELRIC principals, which we are required to follow.

~~While the~~ The PC has raised an intellectually interesting issue concerning the bundling of a number on unused and apparently unwanted vertical services (*e.g.* call waiting) into the basic line port rate that formed the basis for the coin call port rate, and SBC has asserted that this issue in not before the Commission in this matter. We reject SBC's argument that this issue is not before the Commission. The fundamental question that we must address is what is the TELRIC for an unbundled basic line port with vertical features. ~~The only remaining issue that was raised by the pleadings and the initiating order concerned the possibility that the basic port rate already contained cost recovery of all possible software licenses in the maintenance factor. We agree with SBC, as apparently did PC witness Starkey, that~~ While a review of the calculation approved by the Commission in Docket No. 00-0700 shows that annual maintenance costs ~~, that all software costs~~ were removed from the Line Port charge, licensing fees for vertical features were included in the Line Port charge. Tr. 62. SBC has not produced a cost study that identifies specifically the total element long run incremental cost of a basic line port with Flex ANI that also excludes these other vertical features (e.g. call waiting.) Because our prior orders established a rate of $2.18 for the Basic Line Port with all vertical features, and SBC (which as the burden of proof in this proceeding) has not produced an alternative TELRIC cost study, we conclude that SBC shall make available to all CLECs a Basic Line Port with all vertical features at the rate of $2.18 per month. ~~thereby taking this issue off the table. In sum, the (revised) $1.07 adder proposed by SBC is not being recovered, could not have been and was not the subject of any previous request for cost recovery before either the FCC or this Commission and was properly supported by the evidence in this docket.~~

V. FINDINGS AND CONCLUSIONS

The Commission, having considered the entire record herein and being fully advised in the premises, is of the opinion and finds the following:

* * *

(4) The recurring monthly rate for Ameritech Illinois's proposed Basic COPTS Port and the COPTS-Coin Line Port shall be the same as the Basic Line Port, currently $2.18 per month~~, plus $1.07 to reflect the purchase of SFID 332 and 528~~, and subject to any change in the Basic Line Port rate pursuant to the Commission's orders;

(5) Ameritech Illinois Payphone Port Tariff shall otherwise be allowed to remain in effect subject to the above rates set by the Commission under Section 13-801(g) of the Act.

IT IS THEREFORE ORDERED that the recurring monthly rate for Ameritech Illinois's proposed Basic COPTS Port and the COPTS-Coin Line Port shall be the same as the

Basic Line Port, currently $2.18 per month~~, plus $1.07 to reflect the purchase of SFID 332 and 528~~, and subject to any change in the Basic Line Port rate pursuant to the Commission's orders.

CONCLUSION

Wherefore, for each of the foregoing reasons, Data Net Systems, LLC and TruComm Corporation respectfully request that the Commission modify the ALJ's Proposed Order as identified herein and order SBC to provide UNE-P with Flex ANI capabilities with shared transport at the same TELRIC-based rate as that established by the Commission in ICC Docket No. 00-0700.

Respectfully submitted,

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